

UNITED STATES DISTRICT COURT

REPORT ON MEDIATION

1999

I. INTRODUCTION

The mediation program continued with no major changes in 1999. We continue to refer about the same number of cases out to mediation, and we continue to utilize the organizational services of the Nebraska Office of Dispute Resolution and the six mediation centers in Nebraska. The mediation landscape has continued to evolve with the passage of the Alternative Dispute Resolution Act of 1998 and the emerging of a growing practice of “private” mediators in Nebraska. A new “class” of “federal” mediators was trained in the fall of 1999, who will be approved for federal case mediations as they meet the remaining qualifications. In addition, another “Mediators’ Workshop” was held for our approved mediators to refresh skills and review the workings of the program. Finally, we are now approaching the first “renewal” period for approved mediators.

Relations with Office of Dispute Resolution and Mediation Centers

The court continues to refer cases for mediation through the mediation centers established in coordination with the Nebraska Office of Dispute Resolution, as well as to mediators who practice mediation privately. The directors of the centers and ODR reached an agreement concerning the mechanics of referring cases, and that agreement with the court is evidenced by a “Memorandum of Understanding” executed in 1999 (See Appendix). It addresses the maintenance of rosters of mediators, the rotation system utilized, the assignment of cases, fees, and continuing education. This MOU was intended to, and apparently has, clarified the methods of operating the mediation program to resolve some issues that had arisen in the fall of 1998.

The Office of Dispute Resolution has a new director, Wendy Hind, who was appointed to the position by the Nebraska Supreme Court. She will continue to work from the Court Administrator’s Office. She replaces Kathleen Severens, who left ODR to join the United States Department of Justice.

The Omaha mediation center, “Metro Mediation,” ceased operations in 1999. It is now incorporated as a separate nonprofit corporation, independent from its former “parent.” This cessation of operations required the court to refer Omaha cases through the Lincoln-Lancaster Mediation Center, who graciously agreed to act as the referring agency for those cases. As of this writing, the new “Community Mediation Center” is beginning operations at a new location in Omaha.

Court’s Staff

The clerks office now has an ADR Coordinator, Kathy Griess, who monitors the referral process and the progress of mediated cases. She also administers the application process for mediators, evaluations, and the surveys utilized in this report.

Training

The annual workshop for federally approved mediators was held in Lincoln at the Hruska Center on July 30, 1999. Mr. Richard Routman, Esq., Kansas City, MO, Director of Midwest Arbitration and Mediation, Inc., was the facilitator for a half-day skills workshop on ethical problems and other mediation difficulties, using a series of hypothetical exercises for the mediators. The remainder of the day was spent reviewing the operations of the program with the mediators. Twenty-two federal mediators and five mediation center staff members attended the workshop, which was funded by the Federal Practice Fund and the Office of Dispute Resolution.

The fourth "Fed/Med" Training Class was held September 30-October 2, 1999 at the Hruska Center. The facilitator was J. Michael Keating, Jr., Esq., of Providence, RI, a member of the Training Corps of the CPR Institute for Dispute Resolution, New York, NY. He was assisted by "coaches" Betsy Kosier and Paul Ladehoff of the Lincoln Lancaster Mediation Center and Debora Brownyard of the Nebraska Justice Center. This training session was also funded by the Federal Practice Fund and the Office of Dispute Resolution. The first training session held under the new "24-hour" training requirement of the 1997 amendments to the Court's Mediation Plan, it was nevertheless a concentrated training. The 15 trainees were kept busy for the entire time, even going late on Friday evening to accommodate adjournment in time for the University of Nebraska football game Saturday afternoon. Since that training, only one of the trainees has yet been approved to mediate federal cases.

We were very fortunate to have the services of Carol Dart, Director of the Central Mediation Center, who made all the arrangements for both of these training sessions. They could not have happened without her organizational skill.

ADR Act of 1998

The court was required by the ADR Act of 1998 to appoint an "ADR Administrator" to manage its efforts in Alternative Dispute Resolution. The appointee is Magistrate Judge Piester. The court's Mediation Plan was found to comply with the provisions of the Act. No other formal actions have been taken as a response to the passage of that legislation.

II. STATISTICS

The following pages are the "raw" quarterly and annual statistics for calendar 1999, followed by additional information.

Period: January 1999 - March 1999

	Centers	Private	Total
Referrals Pending Beginning of Period	5	5	10
Mediation Orders Entered	10	10	20
Mediation Orders Withdrawn	2	0	2
Settled Prior	2	1	3
Referrals Pending End of Period	4	9	13
Total Actually Mediated (Closures)	7	5	12
Cases Referred to Mediation by Division	Centers	Private	Total
Omaha	3	3	6
Lincoln	6	7	13
North Platte	1	0	1
Total	10	10	20
Outcome of Mediated Cases	Centers	Private	Total
Full Agreement	2	4	6
Partial Agreement	0	0	0
No Agreement	5	1	6
Total	7	5	12
Summary of No\Partial Agreement, After Closure	Centers	Private	Total
Trial Settings Pending Beginning of Reporting Period	8	8	16
Settled	2	3	5
Judgment Entered Without Trial or Settlement	0	0	0
Transfer to Bankruptcy	0	0	0
Trials Held During Reporting Period	0	0	0
Trial Settings Pending at End of Reporting Period	11	6	17

Of the 6 cases that were mediated during the first quarter of 1999 and had no agreement, 0 cases settled and all 6 cases remain pending for trial (5 center and 1 private) at the end of the reporting period. Of the 16 trial settings that were

pending at the beginning of the reporting period, 5 cases settled (2 center and 3 private) and 17 cases are still pending for trial at the end of the reporting period (11 center and 6 private).

Period: April 1999 - June 1999

	Centers	Private	Total
Referrals Pending Beginning of Period	4	9	13
Mediation Orders Entered	7	8	15
Mediation Orders Withdrawn	1	1	2
Settled Prior	1	0	1
Referrals Pending End of Period	4	9	13
Total Actually Mediated (Closures)	5	7	12
Cases Referred to Mediation by Division	Centers	Private	Total
Omaha	3	3	6
Lincoln	3	4	7
North Platte	1	1	2
Total	7	8	15
Outcome of Mediated Cases	Centers	Private	Total
Full Agreement	3	2	5
Partial Agreement	0	1	1
No Agreement	2	4	6
Total	5	7	12
Summary of No\Partial Agreement, After Closure	Centers	Private	Total
Trial Settings Pending Beginning of Reporting Period	11	6	17
Settled	3	2	5
Judgment Entered Without Trial or Settlement	0	0	0
Transfer to Bankruptcy	0	0	0
Trials Held During Reporting Period	1	1	2
Trial Settings Pending at End of Reporting Period	9	8	17

Of the 7 cases that were mediated during the second quarter of 1999 and had no agreement or a partial agreement, no cases settled and all 7 cases remain pending for trial (2 center and 5 private) at the end of the reporting period. Of the 17 trial settings that were pending at the beginning of the reporting period, 5 cases settled (3 center and 2 private), 2 trials were held (1 center and 1 private) and 17 cases are still pending for trial at the end of the reporting period (9 center and 8 private).

Period: July 1999 - September 1999

	Centers	Private	Total
Referrals Pending Beginning of Period	4	9	13
Mediation Orders Entered	4	11	15
Mediation Orders Withdrawn	1	1	2
Settled Prior	1	0	1
Referrals Pending End of Period	1	8	9
Total Actually Mediated (Closures)	5	11	16
Cases Referred to Mediation by Division	Centers	Private	Total
Omaha	1	3	4
Lincoln	3	7	10
North Platte	0	1	1
Total	4	11	15
Outcome of Mediated Cases	Centers	Private	Total
Full Agreement	1	8	9
Partial Agreement	0	0	0
No Agreement	4	3	7
Total	5	11	16
Summary of No\Partial Agreement, After Closure	Centers	Private	Total
Trial Settings Pending Beginning of Reporting Period	9	8	17
Settled	0	0	0
Judgment Entered Without Trial or Settlement	1	1	2
Transfer to Bankruptcy	0	0	0
Trials Held During Reporting Period	2	0	2

Trial Settings Pending at End of Reporting Period	10	10	20
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Of the 7 cases mediated during the third quarter of 1999 that had no agreement, no cases settled and all 7 cases remain pending for trial (4 center and 3 private) at the end of the reporting period. Of the 17 trial settings that were pending at the beginning of the reporting period, 0 cases settled, 2 trials were held (both center), in 2 cases judgment was entered without trial or settlement (1 center and 1 private) and 20 cases are still pending for trial at the end of the reporting period (10 center and 10 private).

Period: October 1999 - December 1999

	Centers	Private	Total
Referrals Pending Beginning of Period	1	8	9
Mediation Orders Entered	5	12	17
Mediation Orders Withdrawn	0	0	0
Settled Prior	0	1	1
Referrals Pending End of Period	4	5	9
Total Actually Mediated (Closures)	2	14	16
Cases Referred to Mediation by Division	Centers	Private	Total
Omaha	3	1	4
Lincoln	2	9	11
North Platte	0	2	2
Total	5	12	17
Outcome of Mediated Cases	Centers	Private	Total
Full Agreement	0	13	13
Partial Agreement	0	0	0
No Agreement	2	1	3
Total	2	14	16
Summary of No\Partial Agreement, After Closure	Centers	Private	Total
Trial Settings Pending Beginning of Reporting Period	10	10	20
Settled	5	1	6
Judgment Entered Without Trial or Settlement	0	0	0
Transfer to Bankruptcy	0	0	0

Trials Held During Reporting Period	0	2	2
Trial Settings Pending at End of Reporting Period	7	8	15

Of the 3 cases that were mediated during the fourth quarter of 1999 and had no agreement, 1 case settled (private) and 2 cases remain pending for trial (both center) at the end of the reporting period. Of the 20 trial settings that were pending at the beginning of the reporting period, 6 cases settled (5 center and 1 private), 2 trials were held (both private) and 15 cases are still pending for trial at the end of the reporting period (7 center and 8 private).

Period: January 1999 - December 1999

	Centers	Private	Total
Referrals Pending Beginning of Period	5	5	10
Mediation Orders Entered	26	41	67
Mediation Orders Withdrawn	4	2	6
Settled Prior	4	2	6
Referrals Pending End of Period	4	5	9
Total Actually Mediated (Closures)	19	37	56
Cases Referred to Mediation by Division	Centers	Private	Total
Omaha	10	10	20
Lincoln	14	27	41
North Platte	2	4	6
Total	26	41	67
Outcome of Mediated Cases	Centers	Private	Total
Full Agreement	6	27	33
Partial Agreement	0	1	1
No Agreement	13	9	22
Total	19	37	56
Summary of No\Partial Agreement, After Closure	Centers	Private	Total
Trial Settings Pending Beginning of Reporting Period	8	8	16
Settled	10	6	16
Judgment Entered Without Trial or Settlement	1	1	2

Transfer to Bankruptcy	0	0	0
Trials Held During Reporting Period	3	3	6
Trial Settings Pending at End of Reporting Period	7	8	15

FOLLOW-UP SURVEYS

Survey questionnaires were sent to counsel in the 16 cases (for the period January 1, 1999 through December 31, 1999) which did not settle at the mediations, but which DID settle before trial, to determine if the settlements occurred “because of” the mediation, “in spite of” the mediation, or if the mediation had “no impact” on settlement. Responses were received from 26 attorneys in 15 cases. Results are below:

TOTAL **RESPONSES**: 26

	“Because Of”	“In Spite Of”	“No Impact”	Total
CENTERS	5	3	8	16
PRIVATE ¹	5	3	2	10
TOTAL	10	6	10	26

CASES REPORTED ON²: 15

CENTERS	1	2	5	8
PRIVATE	2	2	3	7
TOTAL	3	4	8	15

It is commonly thought that even a “failed” mediation (that is, one that does not end in settlement) may spawn fruitful settlement discussions in the future. However, that is not shown to be true with these limited numbers, for a majority of these settled cases were not affected by the mediation's discussion.

¹ It should be noted that many of the “private” mediations were conducted by mediators who have been trained and approved under the court's Mediation Plan. They take cases in addition to those referred through the mediation centers, and some of them mediate significantly more cases “privately” than through the court's referral system.

² When both sides responded in the same case and disagreed as to the effects of the mediation, the comments were considered, and the “least favorable” rating was usually taken for the whole “case,” unless the comments revealed something that clearly indicated a more favorable result, unknown to the other side.

MEDIATION “CAUSED” SETTLEMENT IN 64% OF THE CASES MEDIATED:

Adding the cases settled at the mediations (33) and those later settled “because of” the mediation (3) yields a total of 36 of the 56 cases actually mediated (64%) were settled directly because of the mediation program. Calculated according to Centers/Private, the rates are: Centers: $7/19 = 37\%$; Private: $29/37 = 78\%$.

Effects of Mediation on Settlement, 1999:

	Cases Mediated	Settled AT Mediation	Settled Because of Mediation	Total Cases Settled	Rate of Settlement 1999
Centers	19	6	1	7	37%
Private	37	27	2	29	78%
Totals	56	33	3	36	64.%

In addition, six cases were settled after the entry of the mediation reference order but before the scheduled mediation. It is not known what effect (if any) the impending mediation had on settlement in those cases, but it would not seem likely to have been negative. Finally, it should be noted that of the total of 66 case referrals (those pending Jan. 1, 1999 plus those actually mediated in 1999), only six cases had been tried and only fifteen cases remained set for trial at the end of the period.

It is significant to note that the rate of settlement among the cases referred through the state mediation centers was *less than half* that of the private mediations.

There were four cases mediated in 1999 in which counsel reported that settlement occurred “in spite of” the mediation. Obviously, this is a concern, for the mediation should not “harm” the settlement horizon for any dispute. This should be addressed in the training and renewal applications of the mediators.

III. COMPARISON TO PRIOR PERIODS

Number of Cases Referred: Roughly the same number of mediation reference orders were entered in 1999 as in prior years.

Geography: Most of the mediation reference orders are continuing to emanate from Lincoln, although the difference between Lincoln and Omaha is less in 1999 than prior years. (1998: Of 65 orders, 44 were from Lincoln, 11 from Omaha; 1999: Of 67 orders, 41 were from Lincoln, 20 from Omaha).

Private Referrals: The number of private referral orders continued to increase relative to the referrals to the mediation centers. (35/65 in 1998; 41/67 in 1999).

Settlements: The rate of settlement fell significantly in 1999 among the mediations referred through the mediation centers--to the lowest rate since the beginning of the program--while the rate of settlement rose slightly among private mediations. This caused the overall rate of settlement to drop from 74% in 1998 to 64% in 1999.

	Centers				Private				Totals			
	1997 ³	1998	1999		1997	1998	1999		1997	1998	1999	ALL
MRO's Entered	111	30	26		30	35	41		141	65	67	273
Cases Mediated	83	22	19		21	28	37		104	50	56	210
Cases Settled During Session	27 33%	10 46%	6 32%		9 43%	14 50%	27 73%		36 35%	24 48%	30 54%	90 43%
Effective Settlement Rate ⁴	45%	73%	37%		61%	75%	78%		47%	74%	64%	58% ⁵

IV. EVALUATIONS

³ "1997" includes all prior periods from October, 1995.

⁴ "Effective Settlement Rate" is the number of cases settled at the mediation, plus the number of cases later settled "because of" the mediation, as a percentage of the total number of cases mediated during the period.

⁵ Calculated as follows: Effective Settlement Rates for Centers for the three periods were: 41/92; 16/22; 7/19 = 64/133 = 48.1% overall. For Private Mediations the figures are: 11/18; 21/28; 29/37=61/83=73.5% overall. The combined figures are 125 cases settled because of mediation in 216 cases actually mediated, or 57.8%.

After each mediation the participants are asked to complete an evaluation form, judging various aspects of their mediation from 1 (Excellent!) to 5 (Terrible!). They are asked to either give it to the center or mail it back to the court. Averaged responses to some of the questions are set forth in chart form below.

EVALUATION QUESTION	*PTY-CTRS	SAME 1998 AVE	PTY-PVT	ATTY CTRS	SAME 1998 AVE	ATTY PVT	OVRL AVE
"How was the mediator at remaining neutral?"	1.72	1.82	1.27	1.44	1.59	1.35	1.53
"During the mediation session, how was the mediator-- at giving you opportunities to express your views?"	1.76	1.68	1.00	1.40		1.18	1.39
"...at understanding your/your client's interests and needs in the dispute?"	2.00	1.77	1.15	1.64	1.84	1.24	1.61
"...at allocating appropriate time for the mediation...?"	1.86		1.36	1.92		1.41	1.71
"...at treating you with fairness and respect?"	1.41	1.23	1.04	1.36	1.35	1.06	1.27
"How well were the legal issues of the case identified and discussed during the session?"	1.79	2.14	1.69	1.63	1.84	1.71	1.72
"Overall, how would you rate the mediation process in your case?"	2.52	2.41	1.27	2.20	2.27	1.32	1.99
"From this experience, how satisfactory do you think mediation is to resolve other disputes in which you might be involved?"	2.41		1.42	1.96		1.62	1.95
"How efficient was the procedure of court referral and arranging the mediation session?"	1.72		1.50	1.75		1.73	1.70

* "PTY-CTRS" means "Parties and Insurers--Center Mediations"

"PTY-PVT" means "Parties and Insurers--Private Mediations"

"ATTY CTRS" means "Attorneys--Center Mediations"

"ATTY PVT" means "Attorneys--Private Mediations"

"OVRL AVE" means "Overall Average"

"SAME 1998 AVE" means "The 1998 Average for the same question as the previous column"

Three observations are immediately apparent. First, the general quality of mediations and mediators is seen as having improved from 1998 to 1999. This, despite the lower number of settlements.

A second observation is the lack of any indication that the evaluative techniques reportedly used by some private mediators negatively impacted the evaluation of the process. Although it may be inappropriate to draw that conclusion based on only a small number of cases and participant

evaluations, the fears often expressed by “facilitative” mediators that “evaluative” techniques result in the parties feeling “railroaded,” that element is not shown by these evaluations.

Third, there are significant differences between the perceptions of those participating in “center” mediations and “private” mediations. In nearly every question the responses received from the private mediations averaged to a lower, that is, more favorable, number than the same question put to participants in center mediations. As is seen in the following table, however, some of this difference may be accounted for by the fact that only one evaluation was received from one of the private mediations in which the cases did not settle, and whether a case settled during the mediation session appears to have a lot to do with participants' perceptions of the quality of the mediation and the mediator. Nevertheless, this difference is a major concern.

EVALUATION QUESTION	CASE DID SETTLE IN MEDIATION SESSION			CASE DID NOT SETTLE IN MEDIATION SESSION		
	PRTY	ATTY	AVE	PRTY	ATTY	AVE
“How was the mediator at remaining neutral?”	1.31	1.36	1.34	1.86	1.77	1.82
“During the mediation session, how was the mediator-- at giving you opportunities to express your views?”	1.05	1.12	1.09	2.00	1.59	1.82
“...at understanding your/your client's interests and needs in the dispute?”	1.24	1.28	1.26	2.24	1.76	2.03
“...at allocating appropriate time for the mediation...?”	1.33	1.42	1.38	2.05	2.12	2.08
“...at treating you with fairness and respect?”	1.02	1.08	1.05	1.57	1.47	1.53
“How well were the legal issues of the case identified and discussed during the session?”	1.50	1.56	1.53	2.00	1.75	1.91
“Overall, how would you rate the mediation process in your case?”	1.36	1.42	1.39	2.91	2.47	2.71
“From this experience, how satisfactory do you think mediation is to resolve other disputes in which you might be involved?”	1.40	1.65	1.53	2.84	2.06	2.49
“How efficient was the procedure of court referral and arranging the mediation session?”	1.38	1.64	1.53	1.90	1.88	1.89

In every question, the perception was better if the case had settled during the mediation session. This, even on what would be expected to be unrelated questions, such as the efficiency of the court referral process. Also, the differences in the perceptions by attorneys and parties/insurers did not differ so much in the settled cases (average spread: .10) as in the non-settled cases (average spread: .32), although there may be too few “votes” for this to be statistically significant. Another

possible trivial difference is also apparent: The attorneys' assessments were consistently lower in the settled cases than the parties' and insurers', while the attorneys' assessment were higher or even in the non-settled cases.

Ironically, despite a low rate of settlements reached in the mediations through the centers, their evaluations are surprisingly positive, in fact better than last year. On the other hand, the comments received were quite critical of center mediators who did not push the parties hard enough to move from their positions and reach settlement, as well as those who did not have sufficient litigation experience in the subject area of the case at hand. (Comments are in the Appendix). This is a theme that has been repeated numerous times and probably accounts for the bar's gravitating to those private mediators who are known to be experienced litigators.

Another observation concerns the issue of whether the settlements achieved during the mediations would have eventually occurred anyway, without any mediation or court involvement. This exact question is asked on the evaluation questionnaires now being used, but because the current questionnaire was not being used at all times during the year, and because not all participants answered those questions, those limited results were not tabulated. Of the few responses received, several indicated that the settlement reached either would not have otherwise occurred or would have occurred only much later, after the expenditure of more time and money. Thus, the early indications are that mediation "may" provide a more effective opportunity not only to reach settlement, but also to do so early enough to save litigation costs. This issue should continue to be tracked.

An additional aspect of mediation which continues to be reflected in the evaluation responses is the element of the litigants having an opportunity to "be heard" by a neutral person, and gaining understanding of their opponent's positions and interests in resolving the dispute. This "feel good" element varies greatly from case to case, but seems to be one of the benefits of mediation over other settlement mechanisms.

V. CONCLUSIONS

Generally the mediation program has been a modest success in terms of providing another means to encourage settlement of civil cases. The "effective settlement rate" has gone up and down, but calculating it over the duration of the program, a majority of the cases referred to mediation have settled either at the mediation session or, according to counsel, because of the mediation. Thus, the program has been a **positive force toward settlement**.

Mediation has been seen to result in better "feelings" by the parties, even if they don't settle the case. By allowing litigants to try to resolve "their" problem themselves, mediation offers a controlled setting to peacefully discuss, rather than argue or blame. It permits parties to be in control of how their dispute is ended and to safely demonstrate how "reasonable" they really are in moving toward compromise. The evaluations suggest that, especially if settlement is ultimately achieved, these factors may engender **higher opinions of the court and the judicial system**.

The court's program has been a catalyst for the development of a **private market of mediators**, something that did not exist at the commencement of the program and was then identified as a goal. It has also provided a mechanism for attorneys who are interested in becoming mediators to augment their skills through the "fed/med" training and also through the annual workshops for approved mediators.

There are a number of concerns which have continued since the program's beginning in late 1995. After more than three years of operation there now appears to be sufficient experience and a sufficient number of cases and evaluations to document them.

First, the element of **choice of mediators** is a major concern. Repeatedly attorneys have commented in letters declining to participate in mediation that they want to choose their own mediator, rather than have one selected "at random" by the mediation centers. While the selection process is not really "at random," it is perceived that way, and that perception is furthered when a mediator selected by a center has little or no experience or expertise in the subject matter of the lawsuit. Attorneys understandably would prefer a "known commodity," someone they know either professionally, personally, or by reputation, and now that some attorneys are mediating enough to have a "track record" and a "reputation" for quality work, cases are naturally gravitating to them.

Second, the **passive mediation techniques** utilized by some mediators have been shown to be less effective generally in reaching settlements of cases. Federal cases are much more difficult to settle than others with which the mediators may be more familiar, and some mediators have been reluctant to utilize more aggressive techniques to draw, or push, the parties toward compromise. Many lawyers want a mediator to give an evaluative opinion on the merits or worth of a claim during the mediation, and come to the mediation expecting the mediator to either set their opponent "straight" or help them convince their own client that the lawyer's advice has all along been correct and they should follow it. They view anything short of that as passive, simply observing a conversation that the lawyers and parties either have previously had or could have had without the presence and expense of a mediator. Mediators should be further trained and encouraged to use more aggressive tactics in pursuing settlements.

Third, and related to the second concern, is the **lack of mediation experience** possessed by some mediators. It is true that mediation skills, like other practice skills, improve or diminish in accordance with how frequently they are used. The fewer the cases referred, the more likely it is that the skill level of the mediators will decline. To the extent the bar perceives, correctly or not, that the court's and centers' mediators are not getting "results," their preferences for private mediators will continue, and this problem will be exacerbated.

Fourth, there is a major concern with a **lack of litigation experience** on the part of many mediators. There is no doubt that a mediator's credibility with the parties and attorneys is an essential element of mediation. When dealing with lawyers, simply being a lawyer is not enough to earn credibility. Rather, the mediator must be seen as someone whose suggestions and opinions are worth seeking and hearing--even if the mediator never gives them. That, in turn, requires that the mediator demonstrate proficiency either in the subject matter of the lawsuit or in litigating federal cases, and preferably both. The Mediation Plan's requirements for becoming an approved mediator do not currently include such a proficiency test, and some approved mediators do not have extensive, or even very much litigation experience in federal court.

These concerns are significant, and are echoed to the magistrate judges in lawyers' responses to invitations to mediate cases. They appear to seriously impact the continued viability of the program. They should be addressed if the program is to continue.

There are other concerns, of course, that do not impact so significantly on the viability of the program. These include the low number of cases being referred to mediation, the imbalance between the number referred as between Lincoln and Omaha, the mediators' and centers' requests for a higher fee schedule, the need to educate lawyers on how to effectively represent their clients in mediations, and the need for continuing skills training for mediators, among others. While these concerns do not affect the viability of the program in such a substantial way as those above, they should also be addressed if the program is to improve.

VI. FUTURE OUTLOOK

Another workshop for approved mediators is planned in the fall of 2000, at which many of the operations of the mediation program will be addressed. In addition a skills course will also be offered. At this workshop possible revisions to the program will be discussed in an effort to identify actions that can improve it.

Applications for renewals of "approved" status are now being received from the first mediators approved back in 1995. This process will provide another insight into the usefulness of this program, and an opportunity for mediators to demonstrate their skill levels. Mediators are now being asked whether they will agree to put their applications on the court's web page; if they agree to do so, their "credentials" will be available to prospective mediation participants.

If no changes are made to the court's Mediation Plan, it is likely that the program will continue on its present level of success, possibly improving slowly with the gaining of experience by the approved mediators. It is a viable alternative to litigation, and is "one more tool" available to the court to encourage settlements of civil cases. With the anticipation of a judicial vacancy in 2000, the need for such tools is likely to increase.

The court should continue to monitor and evaluate the program in order to measure its degree of success and identify additional areas for improvement. Improved evaluation forms and the use of them by private mediators is likely to aid in this process.

The court, the centers, and the mediators should address the concerns identified in this report as well as others that have not been discussed in order to improve the quality of the mediation services offered litigants under the court's auspices. Greater communication among these groups should be facilitated.

APPENDIX

1. EVALUATIVE COMMENTS, 1999
2. EVALUATION QUESTIONNAIRES
3. MEDIATION PLAN
4. APPLICATION FOR APPROVAL
5. MEMORANDUM OF UNDERSTANDING
6. SAMPLE MEDIATION REFERENCE ORDER -- CENTERS
7. SAMPLE MEDIATION REFERENCE ORDER -- PRIVATE

EVALUATIVE COMMENTS, 1999

1. PARTIES' COMMENTS RECEIVED ON EVALUATION FORMS

The evaluation forms were distributed to participants in the mediations held through the auspices of the mediation centers as well as the private mediations. The comments received from the parties and insurance company claims representatives appear below:

In Cases That Did Settle During the Mediation Session (Center):

"Good."

In Cases That Did Settle During the Mediation Session (Private):

"Mediator did excellent job of bringing both sides together."

"Went really well."

"Good Job - Thank You"

"Mediation is not a universal panacea, even when parties are likely to be in a long-term relationship. It can be helpful sometimes, as it was, to a limited extent in this case, insofar as we learned a little about the defendant. The mediator continued to describe minimal success as "partial" agreement and made it clear that he had little interest in the second meeting which is obviously necessary to actually get to "partial" agreement. Having said that, defendant repeatedly sought to use the mediation to serve a personal agenda of criticizing another party unrelated to this lawsuit. This made the mediator's job very difficult and he did an excellent job trying to keep us on track."

"John Miller does a great job!!!"

"May have been a little fast paced, however the parties may have influenced that. The process was responsible."

In Cases That Did Not Settle During the Mediation Session (Center):

"Complete waste of time and money. Mediator did not try to move to resolution. Was very equivocating. Did not point out relative strengths and weaknesses of each case to assist each side in making decision to reach settlement. I felt he was very poorly prepared."

"Fee was too high because I feel I wasted 10 hours of my time and my lawyer's time because the other party never even made an offer. The other party I felt did not come with intention to settle."

"Although an agreement was not reached, the process was very helpful. The mediators did a good job of asking the right questions and were empathetic toward parties and issues. In our

case I think we could have moved more quickly toward negotiating a dollar settlement. Our biggest complaint was in not knowing until the day before what amount they were asking for.”

“I came prepared to mediate and the other party was not. Did not proceed in good faith.”

In Cases That Did Not Settle During the Mediation Session (Private):

_____ “Ms. Ackerman did a very good job. Unfortunately, the results were not successful.”

2. ATTORNEYS’ COMMENTS RECEIVED ON EVALUATIONS

In Cases That Did Settle During the Mediation Session (Center):

“In my view it could not have been done by a lay person. This is a super process; Susan Sapp did a good job of moving the process along, understanding the case and remaining neutral.”

“I was pleased that lawyers who knew about employment law were the mediators.”

“Good facilitator.”

“Went fine.”

In Cases That Did Settle During the Mediation Session (Private):

“As to 7b &c, we do not view mediation as a method of saving money. It is helpful to use mediation to reach a fair settlement.”

“Mr. Brownrigg was very professional and helpful.”

“We did know we only had 4 hours but the time was adequate.”

“The mediation resulted in the parties’ agreeing to a settlement value that may or may not allow the parties to conclude the case depending on the ability to satisfy the interests of subrogated third parties while giving the Plaintiff sufficient return to justify settlement and waiver of potentially larger recovery at trial. Two weeks after mediation settlement was confirmed.”

“John [Brownrigg] did a great job. My client became very recalcitrant and we both worked very hard to pull him into reality.”

“Very good mediator - open & honest with the client.”

“I believe the market place provides the best opportunity for mediation/arbitration service. While I do not object to court ordered mediation, I disagree with the court appointing the mediator, unless the parties are unable to agree.”

"John Brownrigg performed very well. Very difficult mediation with city official & presently employed police officer."

"This was the type where mediation should work, unlike some which are unsuited for mediation. However, neither Plf nor her counsel were prepared for participating in a mediation."

"Good session - helpful."

"John [Brownrigg] was excellent."

"John [Miller] is very good - clients feel very comfortable with his approach and recommendations."

"Judge Van Pelt did an excellent job!"

In Cases That Did Not Settle During the Mediation Session (Center):

"Jim [Gordon] did a great job."

"22- didn't take into account preparation time of the mediator."

"Parties had requested a mediator knowledgeable in trademark law. Mediator had no trademark experience and obviously had done little, if any, to bone up on trademark law. Mediator did everything he could to appear neutral; to the detriment of the mediation. Disappointing at best."

"This particular mediation was wholly unsuccessful as Defendant refused to make any settlement offer at all. While Richard's services were satisfactory overall, I feel Defendants should've been told at some point after 6-7 hrs to make an offer or we terminate the session. The cost is reasonable, speaking generally, but \$525 for no settlement offer was ridiculous. This experience was horrible but I still believe in & support mediation as a valuable form of dispute resolution."

"This was a tough case to mediate - Dave Rowe did a good job but the parties were too far apart. I think some progress toward settlement was made and it could well result in settlement eventually."

"I thought the pace could have been picked up a bit - especially caucus sessions, except I wish the mediator were more familiar with employment law."

"We were not sent mediation notice by court until we asked for it."

"Larry [Scherer] was an excellent mediator."

In Cases That Did Not Settle During the Mediation Session (Private):

"Very good session. I would recommend this mediator without reservation."

“Mr. [Steven] Dunham was experienced in employment law which is mandatory in employment mediations!”

“We were able to narrow our differences substantially and are still talking about one issue which unfortunately caused the mediation to be unsuccessful. Having an attorney who was knowledgeable about issues was very helpful in sorting things out.”

“The parties were very far apart on dollar value of the case, but the mediator made a novel proposal where BNSR would “insure” Mr. Dixon’s disability coverage until age 65. This could have been a win/win situation, but once the subsequent medical information was supplied by Dixon, BNSF concluded that the medical records were not strong enough for BNSF to take on the “insurer” role.”

3. MEDIATORS’ COMMENTS RECEIVED ON EVALUATIONS

In Cases That Did Settle During the Mediation Session (Center):

No comments received.

In Cases That Did Settle During the Mediation Session (Private):

_____No comments were received.

In Cases That Did Not Settle During the Mediation Session (Center):

“Several difficulties prevented settlement of the above case, namely: (A) Defendant did not participant due to military reserve duty in Hawaii; (B) pendency of current summary judgment motion frustrated settlement possibilities. Despite these difficulties, the mediation appeared to be very helpful. Once these difficulties are resolved, I would think this case is an excellent candidate for successful settlement.”

“Plaintiff’s attorney was not prepared to move off position. Plaintiff’s attorney did a lot of ‘grandstanding’ in front of the client and refused to acknowledge weaknesses in position regarding law and fact. Plaintiff’s attorney dramatically ended negotiation/mediation over money issue right at 10:00 - 2 hours into the session. I later found out that the attorney had another appointment. Rather than say that or reschedule, he said the mediation was a waste of his clients time and he left. There was also an uncomfortable conflict between plaintiff’s lawyer and the lawyer’s associate who also attend the mediation. This lawyer was antagonizing to the associate.”

In Cases That Did Not Settle During the Mediation Session (Private):

No comments received.

4. LAWYERS' COMMENTS RECEIVED IN FOLLOW-UP SURVEY

The survey, sent in cases that had settled but not during the mediation session, requested attorneys to comment on the effects of the mediation in their case, as well as their views on "interest-based" mediation. Those comments follow.

Centers: "Because Of":

"Mediation helped the parties appreciate that both sides had a case and they could not be sure of winning."

"Mediation brought the parties much closer. Defendant made to realize loss potential. Defendants made aware of some of the actual evidence for the first time. I am not sure what "interest based" mediation is. If what we engaged in was "interest based" mediation I am all for it. It brings another perspective to settlement conferences."

"A document previously unknown to defendant that was decidedly not helpful to the defense was produced by plaintiff's counsel during the mediation session. Following the session, the authenticity of the document was confirmed and defendant's manager directed settlement be made in the least amount proposed by plaintiff during the session. I think very highly of the process. Our mediator, Jim Cordou, did a top flight job."

"The parties were far apart during mediation but the discussions continued between the attorneys after the mediation. It was helpful in getting discussion started. The mediator could have been more forceful in getting the parties to be more realistic about the strengths and weaknesses of the parties' cases. I think it can work - it would help to have a mediator with employment and experience."

"Plaintiff and defendants positions on issues became clearer, enabling the parties to evaluate their positions in addition, a certain amount of discovery was obtained during the mediation which helped settlement along. The concept is good, however, I think perhaps too much time is wasted having the parties articulate their positions. In addition, such a strategy often backfires as it enrages a client to have he or she hear the employer tell them why his or her case is no good. The mediators need to be flexible enough to realize and deal with such situations, especially when there are hard feelings."

Centers: "In Spite Of":

"I was not involved at the time the case was mediated, but it is my understanding from several involved that the particular mediators lacked relative mediation skill and that contributed to the parties becoming entrenched in combative positions. The case settled on the eve of trial - despite the poor experience with mediation. I understand the parties became entrench in polar opposite positions as a result of mediation. I am personally a big believer in mediation. I am particularly concerned that the mediators are experienced attorneys foremost and trained mediators secondarily. The success of mediation depends upon (1) attitude of parties (2) skill of mediators and (3) attitude and skill of the counsel involved."

"The defendant came to mediation with only meager authority. Plaintiff, who was not living in Omaha at time suite was filed, flew in from Atlanta only to waste a full day. Without any progress. It was the pressure of an impending trial that forced the parties back to the table. I can see where it would be helpful in cases involving non-monetary cases, but where the only issue is the amount of \$, it is pointless if one party doesn't want to budge. Also, the way ours was handled - to separate the parties and then the mediator would go back and forth - did little to foster real understanding. Generally, I support mediation, but it wasn't effective in this case for several reasons."

Centers --"No Effect":

"In this case the defendant, who was the damaged party, received more in the eventual settlement than it was prepared to accept at mediation. I think perhaps the mediators should have been stronger on the "cost of litigation" and the plaintiff's attorney had an unrealistic view of his client's liability (obviously not the mediator's fault)."

"P took unreasonable position at mediation which changed as we got closer to trial. I think we should have waited until the completion of some additional discovery before we attempted mediation in this case. I am as much in favor of mediation but have had more success with private mediators than one appointed by the court."

"I think the mediation was helpful to view both the strengths and the weaknesses of the case. Obviously, when you look at these areas, it allows you and the client to further discuss settlement negotiations based on all issued. While mediation was not beneficial or detriment, I would recommend it in the majority of cases."

"Provided plaintiff with an idea of where the defendants were going with settlement. Defendants' first offer was way too low to expect the case to settle at mediation, however it was helpful in determining what their settlement range was."

"Really, the mediation was premature. We were still working at documentary damages and they were unwilling to pay us for what we believed we'd eventually be able to prove. The case ended up settling for almost seven times their final offer at mediation. Not sure what "interest-based" refers to."

"Additional discovery needed to be conducted, including depositions or supervisors and treating doctors."

"I believe the parties came away from the mediation without any significant modification of their respective positions having been achieved, perhaps because the mediation was terminated early. It was only after the attorneys became involved in the case, additional discovery was completed, and positions re-evaluated, that significant progress began to be made toward settlement. I think it depends on both the nature of the case (if what interests other than money may be involved) and upon the willingness of the parties and most importantly their attorneys to let the process work."

"I do not believe the case settled because of, or in spite of, mediation. In fact, the case settled because of plaintiff's deposition, which only was taken after the mediation. The deposition revealed weaknesses in plaintiff's case which resulted in a settlement at a value less than the amount which had been offered by defendant at mediation."

Private – "Because Of":

"The case settled after the mediation through discussions between plaintiff's counsel and counsel for Murphy Brothers. I served as local counsel only and was not involved in any of the settlement discussions following the adjournment of the mediation. My guess is the mediation was a catalyst but I can only speculate as to what degree."

"We had two mediators - one failed completely with only one defendant there. The second was not initially successful - but the arbitrator followed up on the mediator and ultimately helped in reaching a settlement."

"The mediator was able to explain to all parties, including ours, about the risks of a judgment following a trial, which eventually forced all parties to compromise their positions. If the mediation had not occurred, I am confident that this case would have gone to trial."

"Provide mediator was John Brownrigg."

"I believe the mediator was able to assist plaintiff's counsel in convincing plaintiff that there was significant potential that liability would be determined against plaintiff. Required certain parties who had failed or refused to budge on difficult or impalatable issues to do so for an extended period of time."

Private--"In Spite Of":

"Reasons unknown."

"Defendants showed such blatant bad faith (by appearing at mediation with no authority to make any offer in any amount, and thus refusing to make an offer), that, on our motion, Judge Thalken sanctioned defendants and Judge Strom affirmed that order. I would think that these defendants and their counsel will think again before trying to repeat the shenanigans pulled at mediation in this case. The court stomped on them pretty decisively and I think the sanction award was contributory to their eventual decision to settle."

Private--"No Effect":

"I do not know what "interest based" mediation is - but generally mediation can be useful in either settling cases or causing parties to more realistically evaluate their strengths and weaknesses."

"In direct response to the questions posed in your memorandum, I can inform you that the case did not settle (either because of mediation or otherwise); mediation had little effect on the ability to reach settlement; and did not contribute significantly in any way to the ultimate resolution of

the case. However, even with those negatives in mind, the mediation did help us manage the expectations of our clients.”

“The mediation effort probably didn’t have any bearing on the settlement. Neither did the settlement conference, in my view. But, the anticipated complexities and length of trial did. That’s when the plaintiffs come down as far as they’ll go and defendants come up as far as they will; and a settlement results.”